IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236, 77-1237, 77-1269

GENERAL ATOMIC COMPANY,
Petitioner,

v.

THE HONORABLE EDWIN L. FELTER, JUDGE,
Respondent.

On Petitions for Writs of Certiorari to the Supreme Court of New Mexico and on Motion for Leave to File Petition for Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Introduction

The central theme of the responses to GAC's three petitions is a familiar one. This Court is again urged, as it was in 1976, to take no remedial action now. With respect to GAC's petition for mandamus, which seeks long overdue access to federal arbitration, this Court is told that State appellate proceedings are in train. And with respect to the petitions for certiorari, which seek

promptly to set aside local expeditions into the field of foreign affairs, it is said—as it was in 1976—that the New Mexico Supreme Court's rulings rest on non-federal procedural grounds, so that this Court has no power to correct them.

Delay of review by this Court is greatly to the respondents' advantage. Indeed, during the 13½ months between September 14, 1976, when GAC first sought review in this Court of the New Mexico court's injunction against access to federal courts and federal arbitration, and October 31, 1977, when this Court rendered its decision in *General Atomic Co.* v. *Felter*, 434 U.S. 12, UNC benefited substantially from the fact that the invalid judicial decree remained in effect. GAC was forced to conduct and undergo discovery in the State court, to join I & M and Detroit Edison as parties, and to prepare for a trial before a judge who, as this Court ultimately held, had sought improperly to exercise exclusive control over the litigation to GAC's prejudice. And the actions which GAC allegedly took or failed to take during this period of time—while it was objecting to Judge Felter's jurisdictional excesses but was, under pain of contempt, forced to abide by them—ultimately became the foundation for the extraordinary "Discovery Order" issued on November 18, 1977, and the precipitous "Sanctions Order and Default Judgment" of March 2, 1978.

There is, therefore, an issue of law and policy which underlies this case and affects all three of GAC's petitions. That same issue significantly affects the question of timing which the respondents have presented by their various procedural arguments that the case is premature, moot or otherwise beyond this Court's jurisdiction at the present juncture. Should GAC's recourse to federal arbitration outside New Mexico, which has been improperly barred for 25 of the 28 months during which this case has been pending, continue to be denied while the New Mexico Supreme Court (and, possibly, this Court) sort

out the various challenges to the trial judge's summary resolution of litigation over which he had, during all this time, improperly exercised exclusive control? [1]

The arbitration question presented in GAC's Petition for a Writ of Mandamus (No. 77-1237) and the constitutional issues presented in GAC's Petitions for Writs of Certiorari (Nos. 77-1236 and 77-1269) are, in this regard, intertwined. If GAC had been permitted to invoke federal arbitration as early as March 1976, the policy of the Federal Arbitration Act, as reflected in Section 3 of the Act (9 U.S.C. § 3), would have required the New Mexico trial court to stay any further trial proceedings pending the outcome of the federal arbitration. See *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449 (1935). The various procedural measures thereafter taken by UNC, including its demand for documents in the custody of a non-party on the newly injected "international cartel" issue, and its efforts to have Judge Felter override the explicit provisions of foreign law, could never have taken place. But because the New Mexico litigation was permitted to proceed for more than one and one-half years as the *only* forum for resolving disputes between GAC and UNC, the New Mexico trial judge was in a position to issue his ruling of November 18, 1977, with regard to the foreign documents.

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[1] There is a ring of familiarity to the respondents' efforts to secure such delay: On November 29, 1976, in reliance upon the assertion made then by UNC that the action of the New Mexico Supreme Court amounted merely to the implementation of a local procedural rule, this Court remanded the case to the State Supreme Court for an express indication of the basis for its decision. *General Atomic Co.* v. *Felter*, 429 U.S. 973 (1976). The effect of that remand was to delay the resolution of the legal issue presented by GAC for more than eleven months, and thereby to force GAC into a position where Judge Felter could say, as he now has, that the parties have been prejudiced by the extensive discovery and by other actions during this period (Pet. 77-1237, p. 7a).

Similarly, his refusal to implement this Court's decision of October 31, 1977, by permitting GAC to proceed to federal arbitration afforded Judge Felter the opportunity to issue his dispositive Sanctions Order and Default Judgment of March 2, 1978. If federal arbitration had proceeded in San Diego, California, in accordance with the demand filed there by GAC on November 29, 1977 (the day following Judge Felter's belated modification of his order), Judge Felter would have been required to stay the trial proceedings in Santa Fe. Judge Felter would not then have been able to continue with the trial to which he had forced GAC, and the decision of March 2, 1978, could never have been issued.[2]

Consequently, if GAC's Petition for Mandamus is granted and it is finally permitted to proceed to federal arbitration, a necessary consequence of that decision would be to invalidate all trial stages that improperly supplanted the arbitration remedy. This result would follow irrespective of the independent constitutional challenge that GAC has made to the orders of November 18, 1977, and March 2, 1978.

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[2] After the Sanctions Order of March 2, 1978 was entered, UNC asserted that the order had rendered void its contracts with GAC, but Judge Felter said his order did not have that effect. GAC wished to present evidence and argument showing that it would be improper to void the contracts and that the only remedy was damages. Judge Felter repeatedly assured GAC that it would be permitted to present its theory. However, after UNC was given extensive opportunity to present its proof, which consisted entirely of evidence relating to damages, but before GAC was given any opportunity to present *its* proof, including evidence showing that it was improper to void the contracts, Judge Felter declared the contracts void in an order dated April 4, 1978. In this manner, UNC was given an economic benefit worth considerably more than $700,000,000. The order of April 4, 1978 is similar to the ones challenged here in that it would not have been entered if Judge Felter had followed this Court's decision of October 31, 1977 by staying his trial while allowing GAC to proceed to federal arbitration.

I. THE PETITION FOR MANDAMUS

(No. 77-1237)

GAC's position on its right to federal arbitration is simple and straightforward. On October 31, 1977, without requiring full briefs or argument, this Court ruled for GAC in a case in which GAC's Petition for a Writ of Certiorari presented the following question, *inter alia* (Petition, No. 76-1640, p. 4):

> Can a State court in an *in personam* action constitutionally enjoin a defendant from (a) seeking to enforce its rights under the Federal Arbitration Act to require the State court plaintiff to arbitrate or (b) asserting claims against the State court plaintiff in a pending arbitration ordered by a federal court pursuant to said Act?

In its *per curiam* decision, this Court explicitly referred to "federal arbitration proceedings," to the "Federal Arbitration Act" and to the two specific federal arbitrations then pending in Illinois and North Carolina. This Court upheld GAC's right to pursue these and other federal remedies. Notwithstanding this language, the State trial court after remand expressly "stayed" GAC's initiatives in three federal arbitrations, including the Illinois and North Carolina proceedings. This constituted either disobedience or flagrant misunderstanding of this Court's mandate.

Respondents reply, at substantial length, with three arguments:

(1) They contend that mandamus is an improper remedy (UNC Br. in Opp., No. 77-1237, at 10-13; I & M Br. in Opp. at 26-27).

(2) They contend that the grounds relied upon by the trial court for its "stay" were not before this Court when it issued its decision of October 31, 1977 (UNC

Br. in Opp., No. 77-1237, at 13-17; I & M Br. in Opp. at 27-31).

(3) They contend that the trial court's ruling is correct on the merits, and that GAC did, in fact, "waive" its right to federal arbitration (UNC Br. in Opp., No. 77-1237, at 17-23; I & M Br. in Opp. at 31-33).

Each of the arguments is unsound.

1. *Mandamus is appropriate.*—Respondents cite and quote liberally from decisions which describe mandamus as a "drastic and extraordinary remedy" which is to be "sparingly exercised" and limited to "exceptional circumstances." Those cases do not concern, however, a situation in which this Court's mandate has been misapplied or misunderstood by an inferior court. In such a case, the mandamus remedy is the usual means by which the lower court's error is brought to this Court's attention for corrective action.

This Court's ruling of January 23, 1978, in *Vendo Co.* v. *Lektro-Vend Corp.*, 98 S. Ct. 242, was a reminder to counsel of this proper procedural route. In the *Vendo Co.* decision, the Court quoted approvingly from *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), which contains a substantial discussion of the governing rule. It is clear from the many cases cited in the *Sanford Fork & Tool Co.* case (see authorities cited in 160 U.S. at 255-256), as well as from the discussions that followed that case, that the ordinary and preferred avenue for correcting a misapplication of the mandate is by a petition for mandamus. See, *e.g.*, *In re Eastern Cherokee*, 220 U.S. 83, 88-89 (1911) (mandamus should have been instituted earlier); *In re C. & A. Potts & Co.*, 166 U.S. 263 (1897); *Perkins* v. *Fourniquet*, 55 U.S. (14 How.) 328, 330 (1852) ("The question is merely as to the form of proceeding which this court should adopt, to enforce the execution of its own mandate in the court below. The

subject might, without doubt, be brought before us upon motion, and a mandamus issued to compel its execution.")

It is, obviously, desirable that this Court itself resolve questions of construction relating to its own mandate. In the *Sanford Fork & Tool Co.* decision, the Court, speaking unanimously through Mr. Justice Gray, said (160 U.S. at 256; emphasis added):

> The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus, or upon a new appeal, *it is for this court to construe its own mandate and to act accordingly.*

See also *Gaines* v. *Caldwell*, 148 U.S. 228, 238 (1893):

> But we are of opinion that it is proper for this court, on this application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the circuit court has erred, or acted beyond its province, in construing the mandate and opinion, to correct the mistake now and here, and to do so by a writ of mandamus.

Nor is there any merit whatever to the suggestion made in I & M's Brief in Opposition that mandamus will not lie to an inferior State court. *Deen* v. *Hickman*, 358 U.S. 57 (1958), which is cited in GAC's petition, proves that there is no difference between State and federal courts when the issue is whether this Court's mandate has been misapplied. Mandamus is the proper procedure to correct an error in execution. See *Sibbald* v. *United States*, 37 U.S. (12 Pet.) 489 (1838) (mandamus to Superior Court of East Florida to enforce mandate in *United States* v. *Sibbald*, 35 U.S. (10 Pet.) 313 (1836)); *Ex parte Washington & Georgetown R.R. Co.*, 140 U.S. 91 (1891) (mandamus issued to the Supreme Court of the District of Columbia to correct violation of mandate). And *Vendo Co.* v. *Lektro-Vend*

Corp. itself proves that the presence of an appellate court between this Court and the court which is misapplying the mandate is not a bar to mandamus. In that case, a trial court—and not the Court of Appeals for the Seventh Circuit—was proposing to continue a preliminary injunction. This Court did not suggest that the party aggrieved would have to exhaust an appeal to the Seventh Circuit before coming here with a petition for mandamus. It said, rather, that "[i]f petitioner is of the view that the District Court to which the case was remanded is failing to carry out the judgment of this Court," the proper remedy is to proceed under Rule 31 and serve the papers "upon the judge or judges to whom the writ would be directed." 98 S. Ct. at 704.[3]

2. *This Court previously considered and rejected the contention that arbitration had been waived*—In response to GAC's second petition for certiorari, which presented, in the language quoted at p. 5, *supra*, the question of the availability of federal arbitration, UNC asserted that issues relating to rights under the Federal Arbitration Act "were . . . never timely nor properly raised by GAC in the Santa Fe Court . . . ." (UNC Br. in Opp., No. 76-1640, p. 6). The UNC brief went on to state that

[3] Nor is the pendency in the New Mexico Supreme Court of an appeal on the availability of the arbitration remedy a jurisdictional bar to review in this Court by mandamus. This Court may, of course, in the exercise of its discretion, choose to await the decision of the New Mexico court before acting on GAC's petitions. We note, however, that such a course is likely to add substantial delay to that which GAC has already suffered as a result of Judge Felter's invalid injunction. The New Mexico Supreme Court heard oral argument on May 2, and there is no indication of when a decision will be forthcoming. Since this Court's 1977 Term may well end before the New Mexico court rules, and since this Court should not countenance any more delay in this matter, the pendency of the New Mexico action should not be considered, and this Court should act now to enforce its mandate. See *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1319, 1327 (1975).

> GAC never once presented to the courts of the State of New Mexico either of the issues raised in Question No. 3 of its Petition (*id.* at p. 6),

that

> GAC never raised either of the issues presented in Question No. 3 of its petition *either before the trial court* or the Supreme Court of New Mexico (*id.* at p. 7; emphasis added),

that

> GAC has never taken any steps to exercise that right [to arbitration] (*id.* at p. 7),

that

> neither the Santa Fe Court nor the Supreme Court of New Mexico ever had the opportunity to consider or pass upon any claims or questions in this case which related in any way to the Federal Arbitration Act (*id.* at pp. 8-9),

and that

> once GAC had failed to properly raise any issue relating to the Federal Arbitration Act before Judge Felter in the Santa Fe Court, *it had waived its right to present that issue on its petition for a writ of prohibition submitted to the Supreme Court of New Mexico* (*id.* at p. 9; emphasis added).

In its Reply, GAC stated unequivocally (Petitioner's Reply, No. 76-1640, p. 6):

> GAC has specifically raised the pernicious effect of the Injunction on its arbitration rights at every stage of the proceedings leading to the Petition.

Footnotes to this section of the Reply Brief specified the pleadings and briefs in which the right to federal arbitration was asserted "at every stage."

Even a cursory glance at the papers filed with this Court in No. 76-1640 refutes the respondents' assertions that the only claims made there related to the institution

of a civil action in a federal court (I&M Br. in Opp., p. 29) or to "the commencement or prosecution of federal court suits" by GAC (UNC Br. in Opp., No. 77-1237, p. 14). Whether or not GAC's right to federal arbitration had been "waived" was squarely put in issue by UNC's lengthy discussion and by GAC's detailed and documented reply.[4] If this Court had agreed, in any respect, with UNC's argument, it would surely have omitted any reference to federal arbitration from its *per curiam* opinion. Instead, the brief opinion explicitly discusses federal arbitration, and footnotes 11 and 12 address not only the two then-pending federal arbitrations, but also contemplate future federal arbitration by GAC of claims against UNC "under the arbitration provision of the 1973 uranium supply agreement," such as that demanded by GAC in San Diego. Hence the availability of federal arbitration, including the kind of proceeding instituted in San Diego, was considered and decided adversely to UNC and could not be re-examined by Judge Felter.

At the very least, this Court held that GAC had the right to seek federal arbitration in forums other than Judge Felter's court. Pursuant to that mandate, GAC sought arbitration through the American Arbitration Association in accordance with its rules and the Federal Arbitration Act. Even if waiver were an open question, it could be decided only by the arbitrator or by a court in the jurisdiction where arbitration was demanded. It was not, under this Court's mandate, an issue which Judge Felter could preserve for his own forum exclusively.

[4] To the extent that UNC now relies, for its waiver contention, on action or inaction by GAC that occurred *after* the submission of briefs to this Court in No. 76-1640, such conduct was attributable to the invalid injunction. And any conduct by GAC which antedated the submission of UNC's Brief in Opposition in No. 76-1640 was, of course, known to UNC and *could have been* cited in support of the general assertions quoted above. Hence UNC's present effort is simply an attempt to relitigate what was once decided here.

We note, in this regard, that the San Diego office of the AAA accepted GAC's demand and ruled on December 12, 1977 (four days before Judge Felter's first improper waiver ruling), that the arbitrator could decide the waiver question. The Illinois arbitrator permitted the filing of GAC's cross-claim against UNC notwithstanding the claim of waiver.

3. *There was plainly no "waiver" of federal arbitration.*—For the foregoing reasons, the question of "waiver" was not open for Judge Felter's evaluation and decision. In any event, however, his ruling was clearly wrong on the merits, for reasons briefly summarized below.

First, the argument that GAC "explicitly" waived arbitration by the language in its eighth affirmative defense (UNC Br. in Opp., No. 77-1237, at 19-20) is specious. By the time GAC's answer was filed, the injunction against federal arbitration had been in full effect for more than one month, and the sole forum, if any, in which arbitration could then be conducted, under the terms of the court order, was Judge Felter's court. GAC had no obligation to give up all its rights under the Federal Arbitration Act to arbitration in a location appropriate under the arbitration clause in exchange for the exceedingly limited option Judge Felter was offering—arbitration in New Mexico under his "supervision" or "jurisdiction" (UNC Br. in Opp., No. 77-1237, Appendix B, pp. 3a-4a). Indeed, the explicit exclusion on which UNC relies covered only "the scope of *this* arbitration demand," and GAC was plainly intending to preserve the right to make *other* arbitration demands in other forums if and when the prohibitory injunction was lifted.

Second, four of the five "actions" by GAC enumerated in UNC's Brief in Opposition as constituting the basis for Judge Felter's conclusion that the right to arbitration had been waived (UNC Br. in Opp., No. 77-1237, at p. 21) took place *after* the injunction forbidding federal

arbitration was entered.[5] Is GAC to be penalized for not violating a court order while it was in effect and for having filed an answer and counterclaim, participated in discovery, moved for summary judgment and proceeded to trial—subject, of course, to earlier objections? Are Judge Felter and UNC seriously suggesting that the only way for GAC to have preserved its right to federal arbitration was to refuse to file an answer, deliberately to omit counterclaims, not to participate in discovery, fail to file motions and refuse to participate in a trial on the merits? Compare *General Guarantee Ins. Co.* v. *New Orleans General Agency*, 427 F.2d 924, 929 (5th Cir. 1970). If GAC had followed any or all of those courses, one may be certain that the claim that a default judgment was justified would have been argued most vigorously (and persuasively) by the respondents. Every single one of these steps was taken by GAC under duress, with all parties and the court being fully aware that it was GAC's position that Judge Felter's court was not the proper forum for this litigation.

Third, the issue decided by Judge Felter—whether or not GAC had delayed excessively in seeking arbitration—is a question that must be left to the arbitrators, not decided by a court. This Court authoritatively held in *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), that a comprehensive arbitration clause such as the one involved here leaves to arbitrators, not courts, the final determination as to whether a request for arbitration comes too late. Once

[5] Appendix A to this Reply Memorandum is a chart that illustrates the time period covered by Judge Felter's invalid injunction. With respect to UNC's claim that arbitration was waived by "filing two actions against UNC prior to any injunction without demanding arbitration," it should be noted that one of these actions was a lawsuit by Gulf Oil Corporation, and not GAC, and that it concerned a different contract. The other was an interpleader action in which the right to arbitrate was expressly reserved if interpleader jurisdiction was not sustained—which turned out to be the case.

the court has found that "the parties are subject to an agreement to arbitrate" (406 U.S. at 491)—which is not in issue here[6]—claims that arbitration has been unduly delayed must be submitted to the arbitrators. *See, e.g.*, *Halcon International, Inc.* v. *Monsanto Australia, Ltd.*, 446 F.2d 156 (7th Cir.), *cert. denied*, 404 U.S. 949 (1971). Additionally, there is a strong federal policy favoring arbitration, and waiver is not to be lightly inferred. *Carcich* v. *Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968); *Gavlik Construction Co.* v. *H. F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975).

Fourth, the court ignored the plain agreement of the parties that participation in judicial proceedings would not be deemed a waiver of the right to arbitrate. The parties had agreed that the Rules of the American Arbitration Association would be applicable, and Rule 46(a) of those Rules states:

> No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

In addition, Rule 52 provides that any doubt as to the meaning of a Rule is to be resolved by the arbitrator or the AAA:

> The arbitrator shall interpret and apply these rules insofar as they relate to his powers and duties . . . All other Rules shall be interpreted and applied by the AAA.

Finally, there is no merit to the argument, made in a footnote in UNC's Brief in Opposition (pp. 21-22, n. 25)

[6] Although I&M was not a party to an arbitration clause with GAC, its disagreement with GAC depends in large part on the outcome of the GAC-UNC difference, which is subject to arbitration. If GAC prevails in its federal arbitration with UNC, it will be able to provide uranium to I&M, and the principal dispute will, therefore, become moot. Any dispute remaining between GAC and I&M after arbitration would be subject to federal-court jurisdiction on account of diversity of citizenship.

and asserted in Judge Felter's decision (GAC petition, No. 77-1237, pp. 14a-19a), that arbitration should be denied because New Mexico antitrust issues are "inextricably intertwined" with other questions in the case. No federal antitrust issues are present in this case because UNC has deliberately refrained from raising any federal questions to avoid the dispassionate surroundings of a federal forum.[7] UNC's argument that the State antitrust claims are not arbitrable is erroneous. Where only questions of State law and policy are present the Supremacy Clause of the United States Constitution prevents them from defeating the overriding federal policies of the Federal Arbitration Act. See *Free* v. *Bland*, 369 U.S. 663 (1963); *United States* v. *Georgia Public Serv. Comm'n*, 371 U.S. 285 (1963); *Connell Construction Co.* v. *Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1075). This Court has said that the "unmistakably clear congressional purpose" of the federal law is that the arbitration procedure "be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). This

[7] This case is a classic instance in which the interests of a local business enterprise coincide with the State's substantial economic interests. UNC has sought, in arguments to the New Mexico courts, to demonstrate that a ruling in its favor would help the local economy. For example, UNC's motion to the New Mexico Court of Appeals for certification of the pending appeal to the New Mexico Supreme Court (Pet. No. 77-1237, App. I, pp. 32a-35a), urged that the outcome of the case "will effect [*sic*] the entire economy of the State, the tax revenues of the State, and the conservation of New Mexico's irreplaceable material resources." The local press has not been oblivious of the economic realities. An editorial in the *Santa Fe New Mexican* on the date trial began (October 31, 1977) asserted that "[a]ll New Mexico residents have a direct stake in the outcome of a multi-billion dollar uranium lawsuit which will be heard here in District Court beginning today." The editorial went on to observe that if UNC is able to sell its uranium at a price in excess of $40 a pound—instead of the $6 to $10 a pound figure provided in its contract with GAC—"the state stands to gain huge severance tax windfall" under a new tax law. A copy of the full editorial appears as Appendix B, p. ——, *infra*.

policy would be vitiated by resort to "state law which shifts the determination of disputes from arbitrators to courts." *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263, 1269 (7th Cir. 1976).

Moreover, if any court is to carve out a portion of these claims that are not subject to arbitration, it should be the court that has jurisdiction under the Arbitration Act to supervise the arbitration. The site of any arbitration would be San Diego, California, where GAC has filed the required notice, and any question of "intertwinement" should, therefore, be presented to the supervising court in that jurisdiction and resolved by it.

II. THE PETITIONS FOR CERTIORARI

(Nos. 77-1236 and 77-1269)

As we have previously noted (pp. 3-4, *supra*), the issues presented in GAC's petitions for certiorari may become moot if Judge Felter is ordered to vacate his order staying the federal arbitrations and is required to restore the parties to the *status quo ante*—*i.e.*, to the positions they would have occupied if arbitration had not been erroneously enjoined in March and April 1976 and again in December 1977. Even if the petitions for certiorari were entirely dependent upon GAC's companion petition for mandamus, it would be appropriate for this reason to hold the petitions for certiorari until the petition for mandamus is decided, and then to act upon the applications for certiorari in light of the mandamus disposition.

There are, however, independent grounds supporting GAC's petitions for certiorari, and these grounds are not answered by the arguments made in the Briefs in Opposition. Indeed, the respondents' papers appear designed to divert attention from the substantive constitutional issues presented and focus instead on alleged procedural grounds

that are said to insulate the orders from review by this Court.

1. *The November 18 order has not been "superseded."* —One refrain that is repeated in the Briefs in Opposition is the assertion that the "discovery order" of November 18 no longer presents any viable question because it has been "superseded" and rendered moot by the "Sanctions Order and Default Judgment" of March 2, 1978.[8]

As we attemped to make clear in the petition in No. 77-1269 (p. 12), review of Judge Felter's Sanctions Order and Default Judgment, as amended, is not sought in this Court at this time, except to the very limited extent set forth in the petition—*i.e.*, to the extent that it carries into effect the November 18 discovery order. Consequently, the respondents' emphasis upon the "bad faith" findings in Judge Felter's Sanctions Order is entirely beside the point. Although we will not, in this document, burden the Court with a lengthy factual rebuttal to the unwarranted findings of general bad faith in the discovery process, GAC should not be misunderstood as acquiescing in these facts, or in the general conclusion, in any way. Suffice it to say that discovery relevant to this action was promptly provided by GAC. By September 1976, for example, just nine months after this action commenced, GAC had provided UNC's counsel with access to approximately six million pages of documents in GAC's files, of which UNC copied over two hundred thousand. A full factual response to the allegations of bad faith is contained in two briefs, totalling 180 pages, which were filed with the trial judge (and, of

[8] This "supersession" claim is advanced no less than four times in UNC's brief. UNC Br. in Opp., pp. 2, 4, 17, 21. The mootness argument appears in the I & M Br. in Opp., p. 15. I & M initially hedged its position that the order was moot, saying that it was so "except to the extent . . . reflected in the March 2, 1978" sanctions order, as amended. It seems to have withdrawn even this qualification in its Supplemental Brief (I & M Supp. Br., p. 2).

course, served on respondents), and which we are lodging with the Clerk for examination by this Court if further detail is deemed useful.

It is clear, in any event, that the Sanctions Order does in effect carry into execution the earlier discovery order. This appears not only from the text of the Sanctions Order itself (Recital 46, UNC Br. in Opp., Nos. 77-1236 and 77-1269, p. 17a), but even more vividly from its procedural evolution. The November 18 order laid the groundwork for the adoption of conclusive findings against GAC (Pet. No. 77-1236, App. B, pp. 2a-5a). The order of December 27, 1977, refused to vacate the earlier order and reaffirmed it (Pet. No. 77-1236, App. L, pp. 44a-46a). The order of January 25, 1978, reaffirmed once again the November 18 order as "of full force and virtue" (Pet. No. 77-1269, App. E, pp. 33a-35a). And finally came the Sanctions Order itself.

In view of this history and of the express terms of the Sanctions Order, it is difficult to see how UNC and I & M can contend that the November 18 order has been "superseded" or is "moot." If it was invalid when issued and should have been corrected by writ of prohibition at that time, it is equally invalid now. The only difference is that the November 18 order has now been placed in sharper focus with the issuance of another order specifying the sanctions imposed and enunciating the findings of fact contemplated by the original order.

2. *The orders unconstitutionally impede the conduct of foreign policy.*—The extent to which foreign policy has been affected by Judge Felter's orders of November 18, 1977, and March 2, 1978, is demonstrated by the extraordinary action taken by the Government of Canada in sending a Diplomatic Note to this Court and filing an *amicus* brief here. The respondents, in their Supplemental Briefs, take issue with the Canadian Government's interpretation of Judge Felter's orders. Although

both orders rely heavily on GAC's failure to provide "cartel documents" of a non-party located in Canada in response to interrogatories, and the *amicus* brief of the Canadian Government unequivocally represents to this Court that compliance by that non-party with *either* production *or* identification of these documents would violate Canadian law which carries "substantial criminal penalties" (Canada Br., pp. 3-4), the respondents persist in challenging the proposition that such an order interferes with foreign policy. Indeed, the respondents' own briefs highlight the very error that infected Judge Felter's proceedings and that has, apparently, angered the Government of Canada. The brief submitted by the Government of Canada noted that Judge Felter had "magnified the impact" of his erroneous ruling "by disputing the Canadian Government's interpretation of its own Regulations, and by questioning the authority of the Minister of Energy, Mines and Resources to address issues regarding the Regulations . . . ." (Canada Br., p. 11.) The respondents' briefs aggravate the situation even further by continuing to question whether Canadian law forbids identification of the documents, by continuing to question whether Canadian ministers have authority to construe Canadian law (I&M Supp. Br., at 4-5), and by claiming that the formal Diplomatic Note submitted by Canada should be read—contrary to its plain and obvious meaning—as permitting identification of documents (UNC Supp. Br., at 5).

Moreover, the respondents cannot contest the Canadian Government's representation to this Court that Judge Felter made an "unwarranted determination regarding Canadian Government activity and decisions, which were taken at the highest governmental level . . ."—precisely the kind of judgment that the act-of-state doctrine is designed to prohibit—and that the effect of the default judgment is to "encourage Canadian nationals and resi-

dents to violate Canadian law in the future . . ." (Canada Br., at 11-12).

In addition, the subject of Judge Felter's findings and order is one that is now being discussed, on a government-to-government basis, between the appropriate foreign ministries of the two countries (Canada Br., pp. 10-11). How to accommodate the apparently conflicting interests of the United States antitrust laws as they apply to international trade and the sovereign interests of Canada, as manifested in its uranium marketing and uranium security regulations, should be left to international agreement between the governments. It is unfair to squeeze private parties caught between these conflicting interests and it is surely inappropriate, as the Canadian Government has noted, for a State court to "intrude on these intergovernmental consultative processes" (Canada Br., p. 11).

It is clear that issues relating to the serious international economic conflict which has arisen over the marketing of uranium, issues which are currently under negotiation between the Governments of Canada and the United States, cannot properly be resolved by a discovery order or default judgment, which is the way Judge Felter has chosen to resolve them. If these issues are even appropriate for judicial resolution, such resolution must occur on the basis of a full presentation of evidence. Common sense, the magnitude of the international and financial stakes, and the minimal requirements of international comity demand no less.

3. *There is no independent and adequate nonfederal ground.*—Notwithstanding the severity of the impact on foreign relations, the respondents argue that, for State procedural reasons, the New Mexico Supreme Court was simply deferring resolution of the issues until there was a formal judgment. GAC's petitions clearly indicate, however, that our challenge to Judge Felter's orders of November 18, 1977, and March 2, 1978, relate to the

jurisdiction of his court, and that is why the only correct means of curing his error was to issue a writ of prohibition.

The New Mexico Supreme Court has held, in a long line of cases cited in *State ex rel. Transcontinental Bus Serv., Inc.* v. *Carmody*, 53 N.M. 367, 370, 208 P.2d 1073, 1075 (1949), that a writ of prohibition will issue as a matter of right where an inferior court acts outside or in excess of its jurisdiction. Whether denial of the writ occurs summarily upon filing of an application, as it did here, or after issuance of an alternative writ later discharged as improvidently granted, does not affect the fundamental question whether the trial court is exceeding its jurisdiction. The New Mexico Supreme Court necessarily concluded that Judge Felter was not so acting in the instant case, and that conclusion is reviewable here under the authorities cited in GAC's petitions (No. 77-1236, pp. 2, 16; No. 77-1269, p. 2).

Moreover, in light of the nature of the claim—*i.e.*, that such local orders do immediate harm to the entire nation's foreign policy—immediate appellate relief is a necessary part of the claimed right. The injury done to foreign relations by the entry of a State court order which cavalierly impugns the validity of the considered formal policy of a friendly foreign government and threatens (as well as imposes) sanctions for refusal to commit criminal acts in such a foreign country is so substantial that a State's appellate court cannot be permitted to treat such an order as one that is reviewable only in the "regular appellate process" and that must, therefore, await a final judgment and full briefing and oral argument from such a judgment. In the field of foreign relations—just as is true in the area of First Amendment freedoms (compare *Freedman* v. *Maryland*, 380 U.S. 51, 57-60 (1965))—prompt judicial action is an intrinsic part of the protection that must be afforded by

law. The usual appellate processes applicable to civil actions in State courts cannot govern rulings of a trial court that jeopardize foreign policy interests. Otherwise, the judicial system becomes helpless to deal with interlocutory orders that plainly exceed a trial judge's jurisdiction but raise serious foreign policy considerations.

CONCLUSION

For the foregoing reasons, the requested writ of mandamus to require Judge Felter to permit federal arbitration should be granted. GAC's Petitions for Writs of Certiorari should be granted, and the orders of November 18, 1977, and March 2, 1978, should be vacated, either as ancillary relief to the granting of the writ of mandamus or on the constitutional grounds set forth in GAC's Petitions for Writs of Certiorari.

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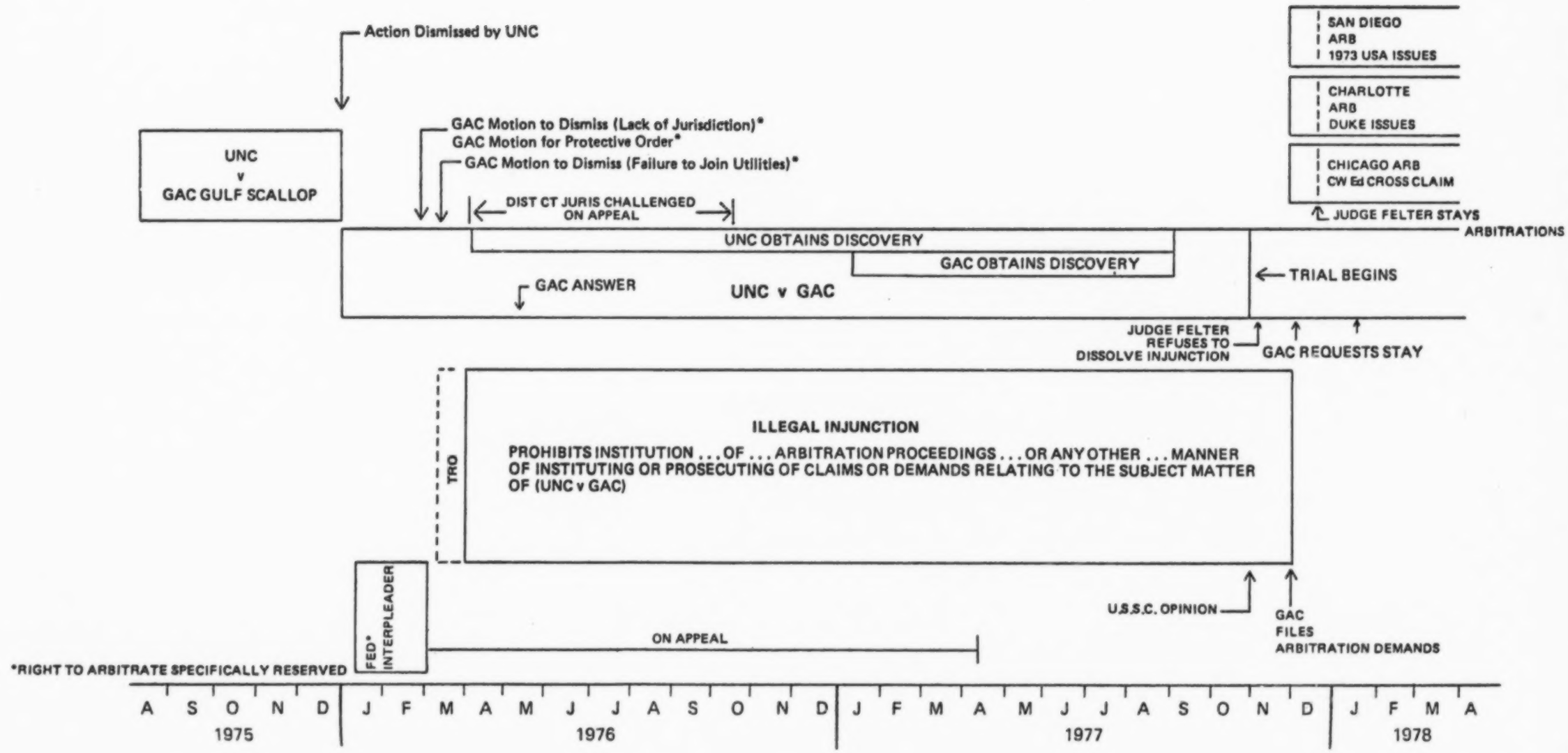
APPENDICES

APPENDIX A

LITIGATION AND ARBITRATION RELATING TO 1973 URANIUM SUPPLY AGREEMENT



APPENDIX B

THE NEW MEXICAN
Santa Fe, N.M. Mon., Oct. 31, 1977

NM's STAKE IN SUIT

All New Mexico residents have a direct stake in the outcome of a multi-billion dollar uranium lawsuit which will be heard here in District Court beginning today.

Many motions and much testimony were heard by Dist. Judge Edwin Felter last week in preparation for the trial which is to determine the fate of a lawsuit brought by United Nuclear Corp. against General Atomic Co., a subsidiary owned in part by Gulf Oil Corp.

At stake is the fate of 27 million pounds of New Mexico uranium scheduled for delivery to General Atomic customers over the next five to 15 years.

United Nuclear is alleging fraud and coercion by Gulf when it was induced to sign two long-term contracts to supply uranium at prices far below the present market price.

Under the contracts United Nuclear is required to provide the 27 million pounds of uranium at prices ranging from $6 to $10 a pound, while the present market price of uranium has soared to more than $40 a pound.

In its $2.2 billion suit United Nuclear alleges that Gulf Oil, through its participation in a uranium cartel with the Canadian government, was able to hold uranium prices artificially low and to coerce the firm into signing long-term contracts at these low prices.

United Nuclear contends it would endure severe economic hardship if it is forced to deliver uranium at prices far below the present market price.

Meanwhile, Gulf, protesting its innocence and claiming was required to participate in the uranium cartel by order of the Canadian government, has filed a $1.3 billion countersuit against United Nuclear claiming that it has conspired to raise uranium prices and to restrain trade.

New Mexicans will be affected by this case because could determine whether the 27 million pounds of uranium sells for between $6 and $10 a pound or $40 a pound. Since the legislature enacted new, larger severance taxes on uranium, which are pegged to the selling price of milled uranium, the state stands to gain huge severance tax windfall, if the higher price is imposed.

The case, involving batteries of lawyers on both sides, tens of thousands of exhibits and hundreds of thousands of pages of testimony is probably one of the largest suits of its kind in history.

At issue are complicated principles and questions involving uranium production and marketing which the average layman could never hope to understand. The outcome, however, will have considerable long-term impact on the state's finances and its taxpayers.